A

EU BOON YEAP & ORS

v.

EWE KEAN HOE

B

COURT OF APPEAL, PUTRAJAYA
MOKHTAR SIDIN JCA
LOW HOP BING JCA
RAUS SHARIF JCA
[CIVIL APPEAL NO: P-02-1085-2005]

C

19 SEPTEMBER 2007

SUCCESSION: *Probate - Validity of will - Testamentary capacity - Burden of proof - Knowledge and approval - Suspicious circumstances - Whether alleged will void on grounds of uncertainty or ambiguity -*

D *Forgery, whether proven - Whether appellate interference warranted - Whether will duly executed*

This was an appeal by the defendants/appellants against the decision of the High Court allowing the claim of the plaintiff/

E respondent and decreeing the grant of probate for the will of one Eu Chin Eow, deceased, ('deceased') dated 26 November 1990, and dismissing the defendants' counterclaim seeking, *inter alia*, to set aside the probate. The plaintiff, the deceased's nephew, was the sole executor, trustee and beneficiary under the will while the

F first, second and third defendants were the deceased's son, daughter and wife respectively. The deceased died on 10 December 1995 at the age of 80, which meant that he was 75 years old when he purportedly executed the will. The defendants submitted the following grounds of appeal: (i) that there was

G misdirection by the trial court in placing upon the defendants the burden of proving the deceased's testamentary incapacity when they were only required to question the deceased's mental capacity; (ii) that, if at all, the alleged will was executed by the deceased, he did not know and approve of the contents of the

H will at the time of the alleged execution; (iii) that there were suspicious circumstances surrounding or relevant to the preparation and execution of the will; (iv) that the alleged will was void on grounds of uncertainty or ambiguity as there were material discrepancies in the description of certain property in the will; and

I (v) that the will did not bear the true and genuine signature of the deceased and was, therefore, a forgery. The plaintiff, in

response, merely averred that the trial court had undertaken a tedious examination of the evidence and arrived at the correct finding that the deceased had duly executed the will.

Held (dismissing the appeal)
Per Mokhtar Sidin JCA (dissenting):

(1) The law is that where unsoundness of mind is alleged, the burden of proof on testamentary capacity rests upon the party propounding the will, which in the present appeal was the respondent. There should not be any doubt that it was sufficient for the appellants, as the party challenging the will, to call into question either by way of pleadings or evidence, the mental capacity of the deceased. The appellants had clearly by their pleadings and evidence raised the issue as to the testamentary capacity of the deceased. The moment the capacity was called into question, the onus lay on the respondent, as the party propounding the purported will, to affirm positively the testamentary capacity of the deceased. (paras 12 & 13)

(2) The learned trial judge, in accepting the evidence that the deceased had 'given instructions for the said will to be drawn up and that the deceased executed the said will' as demonstrating the deceased's testamentary capacity, had failed to appreciate that such evidence by itself did not discharge the burden of proof where there was suggestion to the contrary and where the *factum* was not regular or the will not in ordinary form, which would point towards the burden of proving testamentary capacity remaining with the respondent. On the facts, in the face of the irregular features of the alleged will, and in particular the acknowledgement of SP6, the solicitor who prepared the will, that the instructions given by the deceased were wrong, it was incumbent upon the respondent to establish affirmatively that the deceased did have the testamentary capacity at the time of the purported instructions or the purported execution. In the absence of any evidence, medical or otherwise, the trial judge was not justified in placing the burden of proof on the appellants when he held that they had not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time. (paras 15 & 16)

(3) In the circumstances, the learned trial judge could not possibly have satisfied himself that if at all the deceased had executed the alleged will, he knew and approved of the contents of the alleged will. If there had been due execution, the fact that the will had been explained to the deceased or that the deceased signed the said will after the contents had been explained to the deceased or the fact that it was possible that the deceased could speak or understand Hokkien, did not, as a matter of law, furnish the affirmative proof that the deceased knew and approved of the alleged will's contents. (para 26)

(4) As the appellants had clearly by their pleadings and evidence 'raised the issue as to the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will', there had been misdirection on the part of the trial judge in holding that it was unnecessary to deal with the suspicious circumstances as this 'has been considered and dealt with under the headings of testamentary capacity and due execution'. Apart from the misdirection on the part of the trial judge in failing to address the suspicious circumstances, it was clear that there had been no judicial appreciation of the evidence when the trial judge held that the suspicious circumstances 'were all circumstantial and some were mere conjecture and speculation'. Contrary to the trial judge's observation, the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will were, having regard to the facts of the case, indeed factual and far too overwhelming to dispel. (para 28)

(5) Given the material discrepancy in the description of a certain property in that the deceased did not own an undivided share in the property mentioned, and in the absence of 'any evidence as to whether the deceased knew the meaning of undivided share, or his intention in respect of the property he owns', the alleged will was uncertain or ambiguous and, consequentially, no probate could therefore be ordered or enforced in respect of the alleged will. (para 35)

(6) With regard to the issue of forgery, the only evidence by the appellants was the evidence of the handwriting expert, SD3. However, the test carried out by SD3 was unsatisfactory because it was based on only one document and not several documents bearing the signatures of the deceased. In view of

this, the learned judge was correct in holding that the appellants had failed to prove that the signature of the deceased on the will was a forgery. (para 37)

(7) Although the signature on the will was not a forgery, it did not mean that the respondent had succeeded in proving the will. The authorities show that where issues had been raised as to the testamentary capacity of the deceased testator or as to his knowledge and approval or suspicious circumstances, the onus is on the propounder, which in this case was the respondent, to discharge the burden of proof. Having perused the record, it was clear that the respondent had failed to discharge his burden of proof in respect of testamentary capacity. (para 38)

Per Low Hop Bing JCA delivering the majority judgment of the court:

(1) In the light of the established authorities, there was no misdirection by the trial court in holding that the defendants bore the burden of establishing the deceased's testamentary incapacity as an extraneous vitiating element. *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* (foll); *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* (foll); *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* (foll). (paras 50 & 51)

(2) The question of whether the will had been forged was one of fact. The learned trial judge had the audio-visual advantage of evaluating the evidence of the plaintiff's witnesses, in particular SP3, SP4, SP5 and SP6, who were disinterested witnesses testifying for the plaintiff. All these four witnesses had given direct evidence that it was the deceased who had executed the will. SP6, the solicitor to whom the deceased had given instructions to prepare the will, had testified that due execution of the will by the deceased was witnessed by two persons *viz*. SP3, also a solicitor and the solicitor's clerk, SP4. The deceased's due execution of the will was at the same time effected in the presence of SP5, who was a friend of the deceased and who was with the deceased. There was no evidence that any of these four witnesses were actuated by any ulterior motive or collateral purpose to induce them to concoct half-truths or untruths in relation to the respective roles played by them. By way of comparison and contrast, the trial court found that the evidence adduced for the defendants

was at best bordering on conjecture and speculation. The trial court's specific finding of facts based on the acceptance of the evidence adduced for the plaintiff as credible, in preference to the evidence adduced for the defendants, was free from any error. The trial court was correct in holding that the plaintiff, as the propounder of the will, had discharged the burden of proving due execution of the will. (paras 69, 70, 71, 72 & 73)

(3) In considering whether the defendants as the challengers or impugners of the will had succeeded in discharging the onus of establishing forgery as a vitiating element, the evidence of the handwriting expert, SD3, must be viewed in the light of the evidence of the plaintiff's disinterested witnesses who had actually seen the signing of the will by the deceased and the fact that the trial court had found them to be credible witnesses. The trial court, in following *Lee Ing Chin (supra)*, had, therefore, correctly declined to accept SD3's evidence, and rightly held that the defendants had failed to discharge the burden of proving forgery. (paras 74, 75, 76, 77 & 78)

(4) The trial court had meticulously embarked upon a sufficient appreciation of the evidence adduced at the trial by assessing, weighing and for good reasons, accepting the evidence of the due execution adduced for the plaintiff as credible, and meanwhile, finding that the defendants had not discharged the burden of proving the testamentary incapacity of the deceased and forgery of the will. On the issues of testamentary incapacity, due execution and forgery, applying the principle in *Gan Yook Chin (supra)* concerning evaluation of evidence, there was no appealable error on the part of the trial court to warrant any appellate interference. (paras 79, 81 & 82)

(5) The description of certain property as 'rubber estate' and 'undivided share' and the different addresses alluded to in this case were minor discrepancies which did not give rise to any doubt in relation to the identity of the property, as the material particulars such as the lot numbers, the mukim and the district had been accurately and specifically stated in the will. There was no uncertainty or ambiguity in the contents of the will and, hence, the validity of the will was in no way

negated. The trial court's finding was based on the credibility of the witnesses after embarking upon a proper judicial appreciation of the evidence adduced at the trial. There was no misdirection in this respect and so this court must refrain from any appellate interference. (paras 86 & 87)

(6) The plaintiff as propounder of the will bore the burden of dispelling any suspicious circumstance that may surround the making of the will. This burden may be discharged by showing that the deceased, being of competent mind, had his will read over to him, or that the deceased knew and approved of the contents of the will. Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will had been read over to the deceased and he understood the dispositions of the will, after which the deceased had executed the will as his will, there was an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will. (paras 92, 93 & 94)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan-defendan/perayu-perayu terhadap keputusan Mahkamah Tinggi kerana membenarkan tuntutan plaintif/responden dan mendekrikan pengeluaran probet bagi wasiat seorang Eu Chin Eow, simati, ('simati') bertarikh 26 November 1990, sekaligus menolak tuntutan balas defendan-defendan yang antara lain memohon untuk mengenepikan probet tersebut. Plaintif, yang merupakan anak saudara simati, adalah wasi tunggal, pemegang amanah dan benefisiari di bawah wasiat, sementara defendan-defendan pertama, kedua dan ketiga adalah masing-masingnya anak lelaki, anak perempuan dan isteri simati. Simati meninggal dunia pada 10 Disember 1995 ketika berumur 80 tahun, yang bermakna beliau berumur 75 tahun ketika beliau dikatakan memeterai wasiatnya. Defendan-defendan mengemukakan alasan-alasan rayuan berikut: (i) bahawa terdapat salah arahan oleh hakim bicara dalam meletakkan atas defendan-defendan beban untuk membuktikan ketakupayaan berwasiat simati sedangkan mereka hanya perlu mempersoalkan ketakupayaan mental simati; (ii) bahawa, jika sekiranya pun wasiat yang dikatakan itu dibuat oleh simati, beliau tidak mengetahui atau menyetujui tentang kandungannya pada waktu wasiat dimeterai; (iii) bahawa terdapat halkeadaan sekeliling bersyakwasangka terhadap atau yang relevan

kepada penyediaan dan pemeteraian wasiat; (iv) bahawa wasiat yang dikatakan itu adalah batal atas alasan ketidakpastian atau kesamaran disebabkan terdapatnya percanggahan-percanggahan material pada pemerihalan harta-harta tertentu di dalam wasiat; dan (v) bahawa wasiat tidak menunjukkan tandatangan simati yang betul dan tulen dan adalah dengan itu satu pemalsuan. Plaintif, dalam jawapannya, hanya berhujah bahawa mahkamah bicara telah membuat penelitian yang rapi ke atas keterangan dan telah mencapai keputusan yang tepat bahawa simati telah memeterai wasiat dengan teratur.

Diputuskan (menolak rayuan)
Oleh Mokhtar Sidin HMR (menentang):

(1) Undang-undangnya adalah bahawa dimana dakwaan ketakwarasan fikiran dibuat, beban untuk membuktikan keupayaan berwasiat adalah atas pihak yang mendokong wasiat, yang dalam rayuan ini adalah responden. Tidak disangsikan bahawa adalah memadai bagi perayu-perayu, sebagai pihak yang mencabar wasiat, untuk hanya mempersoalkan keupayaan mental simati sama ada melalui pliding atau keterangan-keterangan. Adalah jelas bahawa perayu-perayu melalui pliding dan keterangan mereka telah membangkitkan isu mengenai keupayaan berwasiat simati. Sebaik sahaja keupayaan ini dipersoalkan, beban adalah terletak ke atas responden, sebagai pihak yang mendokong wasiat, untuk mengesahkan secara positif keupayaan berwasiat simati.

(2) Yang arif hakim bicara, dalam menerima keterangan simati telah "mengarahkan supaya wasiat tersebut ditulis dan bahawa simati telah memeterai wasiat tersebut" sebagai menunjukkan keupayaan berwasiat simati, gagal melihat bahawa keterangan tersebut secara bersendirian tidak boleh melunaskan beban pembuktian jika terdapat unsur-unsur sebaliknya dan di mana terdapat ketidakteraturan *factum* atau wasiat yang tidak dalam bentuknya yang biasa, yang sekaligus menunjukkan bahawa beban untuk membuktikan keupayaan berwasiat masih berada di pihak responden. Di atas fakta, berdasarkan ciri-ciri luar aturan yang ada pada wasiat, khususnya pengakuan SP6, peguam yang menyediakan wasiat, bahawa arahan yang diberikan oleh simati adalah salah, maka ianya menjadi tanggungjawab responden untuk membuktikan dengan afirmatifnya bahawa simati memiliki keupayaan berwasiat semasa

memberi arahan tersebut atau semasa memeterai wasiat. Dalam ketiadaan keterangan sedemikian, sama ada keterangan perubatan atau sebaliknya, maka hakim bicara tidak mempunyai justifikasi untuk meletakkan beban membukti kepada perayu-perayu seperti yang dibuatnya di sini, bilamana beliau memutuskan bahawa perayu-perayu gagal mengemukakan laporan perubatan bagi menunjukkan bahawa simati tidak mempunyai keupayaan berwasiat atau hilang akal pada waktu relevan.

(3) Dalam keadaan yang wujud, yang arif hakim bicara tidak mungkin dapat memuaskan hatinya bahawa jikapun simati telah memeterai wasiat yang dikatakan itu, beliau tahu dan menyetujui kandungan wasiat tersebut. Jika wujud pemeteraian yang teratur, fakta bahawa wasiat telah diperjelas kepada simati atau bahawa simati menandatangani wasiat setelah kandungannya diperjelas kepadanya atau fakta bahawa simati mungkin boleh bertutur atau memahami Hokkien, tidak boleh, sebagai suatu perkara undang-undang, menjadi bukti afirmatif bahawa simati mengetahui dan bersetuju dengan kandungan wasiat yang dikatakan itu.

(4) Oleh kerana perayu-perayu, melalui pliding dan keterangan-keterangan, telah 'membangkitkan isu halkeadaan bersyakwasangka yang mengelilingi dan relevan kepada penyediaan dan pemeteraian wasiat yang dikatakan', maka terdapat salah arahan di pihak hakim bicara dalam memutuskan bahawa adalah tidak perlu untuk menangani persoalan halkeadaan bersyakwasangka oleh kerana ia 'telah dipertimbang dan ditangani di bawah perkara keupayaan berwasiat dan pemeteraian teratur'. Selain dari salah arahan di pihak hakim bicara kerana gagal menangani halkeadaan bersyakwasangka, adalah juga jelas bahawa penilaian kehakiman telah tidak dibuat terhadap keterangan-keterangan bilamana hakim bicara merumuskan bahawa halkeadaan bersyakwasangka 'adalah semuanya bersifat ikut keadaan dan sebahagiannya pula adalah semata-mata tekaan dan spekulasi'. Bertentangan dengan pandangan hakim bicara, halkeadaan sekeliling yang menimbulkan syakwasangka terhadap atau yang relevan kepada penyediaan dan pemeteraian wasiat yang dikatakan, mengambilkira keadaan kes, adalah berbentuk fakta dan terlalu menyeluruh untuk ditolak.

A **(5)** Mengambilkira bahawa terdapat percanggahan material pada pemerihalan sesuatu hartanah dalam ertikata bahawa simati tidak memiliki bahagian tak berbelah bagi dalam hartanah yang dikatakan itu, dan dalam ketiadaan 'sebarang keterangan sama ada simati mengetahui maksud bahagian tak berbelah bagi, B atau niatnya berkaitan hartanah yang dimilikinya', wasiat yang dikatakan itu adalah tidak pasti dan kabur dan, dengan itu, tiada probet boleh diperintahkan atau dilaksanakan berhubung wasiat yang didakwa itu.

C **(6)** Berkaitan isu pemalsuan, satu-satunya keterangan perayu-perayu adalah keterangan pakar tulisan tangan, SD3. Bagaimanapun, ujian yang dibuat oleh SD3 tidak memuaskan kerana ianya diasaskan hanya kepada satu dokumen dan bukannya kepada beberapa dokumen yang mengandungi D tandatangan simati. Oleh itu, yang arif hakim betul bilamana memutuskan bahawa perayu-perayu gagal membuktikan bahawa tandatangan simati pada wasiat adalah satu pemalsuan.

E **(7)** Walaupun tandatangan pada wasiat bukan satu pemalsuan, ianya tidak bermakna bahawa responden telah berjaya membuktikan wasiat. Autoriti-autoriti menunjukkan bahawa di mana isu-isu mengenai keupayaan berwasiat pewasiat telah dibangkitkan, atau mengenai pengetahuan dan persetujuannya F ataupun mengenai halkeadaan-halkeadaan yang menimbulkan syakwasangka, tanggungan adalah di atas pendokong wasiat, iaitu responden dalam kes ini, untuk melunaskan beban pembuktian. Di atas rekod, jelas bahawa responden gagal melunaskan beban pembuktian berhubung dengan keupayaan berwasiat.

G

Oleh Low Hop Bing HMR menyampaikan penghakiman majoriti mahkamah:

(1) Berdasarkan autoriti-autoriti mantap, tiada salah arahan oleh H mahkamah bicara dalam memutuskan bahawa defendan-defendan memikul beban untuk membuktikan keupayaan berwasiat simati sebagai elemen penjejas luaran. *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* (diikuti); *William Henry Bailey & Ors v. Charles Lindsay Bailey* (diikuti); *Lee Ing Chin & Ors* I *v. Gan Yook Chin & Anor* (diikuti).

(2) Persoalan sama ada wasiat telah dipalsukan adalah persoalan fakta. Yang arif hakim bicara mempunyai kelebihan audio-visual untuk menilai keterangan saksi-saksi plaintif, terutama SP3, SP4, SP5 dan SP6, yang merupakan saksi-saksi bebas yang memberi persaksian untuk plaintif. Keempat-empat saksi ini memberi keterangan terus bahawa simati sememangnya telah memeterai wasiat. SP6, peguamcara yang diarah oleh simati untuk menyediakan wasiat, telah mengatakan bahawa pemeteraian teratur wasiat telah disaksikan oleh dua orang, iaitu SP3, seorang peguamcara, dan kerani guaman, SP4. Pada masa yang sama, pemeteraian teratur wasiat oleh simati juga telah dilaksanakan dengan kehadiran SP5, seorang kawan simati yang datang dengan simati. Tiada keterangan bahawa salah seorang dari empat saksi ini dipengaruhi motif tidak baik atau oleh maksud-maksud kolateral yang mendorong mereka untuk mereka-reka cerita palsu atau separuh palsu berkenaan peranan-peranan yang mereka mainkan. Secara perbandingan, mahkamah bicara mendapati bahawa keterangan defendan-defendan paling tinggipun hanya mencapai tahap tekaan dan spekulasi. Dapatan spesifik mahkamah bicara yang diasas kepada penerimaan keterangan plaintif sebagai keterangan yang boleh dipercayai, dan yang diutamakan berbanding keterangan defendan-defendan, adalah bebas dari kekhilafan. Mahkamah bicara betul apabila memutuskan bahawa plaintif, sebagai pendokong wasiat, telah melunaskan beban untuk membuktikan bahawa pemeteraian wasiat adalah teratur.

(3) Dalam menimbang sama ada defendan-defendan selaku pencabar wasiat telah berjaya melunaskan tanggungan untuk membuktikan pemalsuan sebagai satu elemen penjejas, keterangan pakar tulisan tangan, SD3, perlu diteliti bersekali dengan keterangan saksi-saksi bebas plaintif yang melihat sendiri pemeteraian wasiat oleh simati dan fakta bahawa mahkamah bicara telah mendapati mereka sebagai saksi-saksi yang boleh dipercayai. Mahkamah bicara, dalam mengikuti *Lee Ing Chin (supra)*, dengan itu, telah dengan betulnya enggan menerima keterangan SD3, dan telah memutuskan dengan betulnya bahawa defendan-defendan gagal melunaskan tanggungan untuk membuktikan pemalsuan.

(4) Mahkamah bicara telah meneliti dengan secukupnya keterangan-keterangan yang dikemukakan di perbicaraan dengan cara menilai, menimbang dan seterusnya atas alasan yang kukuh menerima sebagai boleh dipercayai keterangan plaintif bahawa terdapat satu pemeteraian yang teratur di sini, sementara mendapati defendan-defendan gagal melunaskan tanggungan untuk membuktikan ketakupayaan berwasiat simati serta pemalsuan wasiat tersebut. Atas isu ketakupayaan berwasiat, pemeteraian yang teratur dan pemalsuan, dengan menggunapakai prinsip di dalam *Gan Yook Chin (supra)* berkaitan penilaian keterangan, tidak terdapat apa-apa kesilapan yang boleh dirayui telah dilakukan oleh mahkamah bicara yang mewajarkan campurtangan peringkat rayuan.

(5) Pemerihalan hartanah tertentu sebagai 'ladang getah' dan 'bahagian tak berbelah bagi' serta alamat-alamat yang berbeza yang ditohmah terhadap kes ini adalah percanggahan-percanggahan kecil yang tidak membangkitkan apa-apa keraguan berhubung identiti hartanah, kerana butiran-butiran material seperti nombor lot, nama mukim dan daerah telah dicatitkan dengan betul dan spesifik di dalam wasiat. Tidak ada ketidakpastian atau kekaburan pada kandungan wasiat, dan kerana itu, kesahan wasiat tidak lagi boleh disangkal. Dapatan-dapatan mahkamah bicara adalah diasaskan kepada kebolehpercayaan saksi-saksi setelah keterangan-keterangan di perbicaraan dinilai secara kehakiman dan dengan sewajarnya. Tiada salah arahan dari aspek ini dan oleh itu mahkamah ini harus mengelak dari mengganggui keputusan yang dibuat.

(6) Plaintif selaku pendokong wasiat memikul tanggungan untuk menghapuskan apa jua syakwasangka pada keadaan sekeliling yang mungkin wujud ketika wasiat dibuat. Tanggungan ini boleh dilunaskan dengan menunjukkan bahawa simati masih berfikiran waras dan bahawa wasiat telah dibaca kepadanya, ataupun bahawa simati tahu dan bersetuju dengan kandungan wasiat. Oleh kerana mahkamah bicara telah menerima keterangan-keterangan SP2 hingga SP6 dan telah mencapai rumusan fakta spesifik bahawa wasiat memang telah dibacakan kepada simati dan simati memahami kandungannya dan seterusnya memeterai wasiat itu sebagai wasiatnya, maka sudah tidak wujud lagi apa yang dikatakan halkeadaan syakwasangka itu dan begitu juga dengan semua isu-isu kolateral yang dibangkitkan terhadap kesahan wasiat.

Case(s) referred to:

Dr Shanmuganathan v. Periasamy Sithambaram Pillai [1997] 2 CLJ 153 FC ***(refd)***

Fulton v. Andrew [1875] LR 7 HL 448 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Ors [2004] 4 CLJ 309 FC ***(foll)***

Kameswara Rao v. Suryaprakasarao AIR [1962] AP 178 ***(refd)***

Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors [1998] 1 LNS 340 HC ***(refd)***

Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA ***(foll)***

Motibai Hormusjee v. Jamesetjee AIR [1924] PC 28 ***(refd)***

Newton v. Ricketts [1861] 11 ER 731 ***(refd)***

Surendra Pal v. Saraswati Arora AIR [1974] SC 1999 ***(refd)***

Tyrrell v. Painton [1894] P 151 ***(refd)***

Udham Singh v. Indar Kaur [1971] 1 LNS 144 ***(refd)***

Waring v. Waring [1848] 13 ER 715 ***(refd)***

William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors [1924] 23 CLR 558 ***(foll)***

Legislation referred to:

Rules of the High Court 1980, O. 71 rr. 9(1), 10

Other source(s) referred to:

Harcharan Singh Tara, *Examination of Handwriting and Signatures,* [1995] 3 MLJ i

Tristram and Coote's Probate Practice, 28th edn 1995, pp 658, 659

For the appellants - JA Yeoh (JJ Chan with him); M/s Shearn Delamore & Co

For the respondent - Ooi Soo Jit; M/s Wong-Chooi & Mohd Nor

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-290-1996]

Reported by Suresh Nathan

JUDGMENT

Mokhtar Sidin JCA:

[1] Briefly, the appeal before us concerns the decision of the High Court in allowing the respondent's claim to probate in respect of the alleged will of Eu Chin Eow, deceased, dated 26 November 1990 and in refusing the appellants' counterclaim that the alleged will is invalid and that the deceased died intestate. The said Eu Chin Eow (the deceased) died on 10 December 1995 aged 80 years old, survived by his eldest son Eu Boon Yeap the 1st appellant, his daughter Eu Siew Cheng the 2nd appellant and

his wife Ong Sin Kheng, the 3rd appellant. At the time of the deceased's purported execution of the alleged will dated 26 November 1990, the deceased was 75 years old.

[2] The respondent in the present appeal, the plaintiff in the court below, filed a writ of summons dated 11 September 1996 against the 1st appellant. He is the nephew of the deceased and the statement of claim reads:

> 1. Plaintif ialah wasi yang dilantik di dalam wasiat terakhir Eu Chin Eow, simati beralamat di No. 3 Jalan Padang Tembak, Pulau Pinang yang meninggal dunia pada l0hb Disember 1995, wasiat tersebut adalah bertarikh 26hb November 1990.
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> 2. Plaintif manafikan kepentingan Defendan yang dinyatakan di Kaveat yang dibuat oleh Peguamcara Defendan bertarikh 13 Mei 1996, sitasi yang difailkan oleh Defendan pada 13hb Jun, 1996 dan Afidavit Eu Boon Yeap bertarikh 13 Jun, 1996 terhadap Petisyen Probet No. 32-66-1996 di Mahkamah Tinggi, Pulau Pinang untuk Harta Pesaka Eu Chin Eow, simati.
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> 3. Oleh itu, Plaintif menuntut:
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> a. bahawa Mahkamah mengdekrikan Probet Wasiat Eu Chin Eow bertarikh 26hb November 1990;
>
> b. gantirugi-gantirugi;
>
> c. kos-kos; dan
>
> d. relif selanjutnya yang Mahkamah mulia ini anggap sesuai dan suaimanfaat.

[3] The 1st appellant then filed the following defence and counterclaim:

> 1. As regards para 1 of the Statement of Claim, the Defendant denies that the Plaintiff was lawfully appointed as sole executor and trustee of the Will of Eu Chin Eow dated 26 November, 1990. The Defendant avers that the said Eu Chin Eow died intestate on 10 December, 1995 and is survived by the following beneficiaries:
>
> (i) Ong Sin Kheng – lawful widow
>
> (ii) Eu Siew Hua – lawful daughter
>
> (iii) Eu Boon Yeap – lawful son
>
> (iv) Eu Siew Cheng – lawful daughter

2. Plaintiff further avers that the purported signature of the testator appearing in the said Will is a forgery and that in the premises the Will is invalid and of no effect.

3. As regards para 2 of the Statement of Claim, the Defendant avers that the said Caveat dated 13 May, 1996 was entered to ensure that no grant was made without notice to himself and that the said Citation dated 13 June, 1996 was a necessary step taken by the Defendant in order to have the Probate granted to the Plaintiff on 13 May, 1996 called in, revoked and declared null and void in law.

4. Save and except as is expressly admitted herein the Defendant denies each and every allegation in the Statement of Claim as if the same were herein set forth seriatim and specifically traversed.

5. The Defendant therefore prays the claims be dismissed with costs.

COUNTERCLAIM

6. The Defendant repeats paras 1 to 5 of the Defence and counterclaims against the Plaintiff as follows:

(i) A declaration that the Will dated 26 November, 1990 is null and void in law on the ground of forgery;

(ii) A declaration that Eu Chin Eow died intestate and is survived by the lawful beneficiaries as pleaded in para 1 of the Defence;

(iii) Damages;

(iv) Costs;

(v) Further or other relief.

[4] The 2nd and 3rd appellants filed their defence and counterclaim dated 30 July 1999 which reads:

1. Save and except that the Plaintiff was named as the sole executor and trustee in the alleged last will and testament dated 26th November 1990, the 2nd and 3rd Defendants deny that the said Eu Chin Eow, deceased had ever executed the alleged last will and testament or at all.

2. Save and except that the 1st Defendant has lodged a caveat against the issuance of probate in respect of the alleged last will and testament dated 26th November 1990 the 2nd and 3rd Defendants deny that the interest therein was limited only to that of the 1st Defendant.

3. Save as is herein expressly admitted, the 2nd and 3rd Defendants deny each and every allegation contained in the Statement of Claim as though the same were herein specifically set out and traversed seriatim.

Wherefore the 2nd and 3rd Defendants pray that the Statement of Claim be dismissed with costs.

COUNTERCLAIM

4. The 2nd and 3rd Defendants repeat paragraphs 1 to 3 of the Defence

5. The 2nd and 3rd Defendants are the lawful widow and daughters respectively of the said Eu Chin Eow, deceased who passed away on 10th December 1995 intestate.

6. The 2nd and 3rd Defendants aver that the alleged last will and testament dated 26th November 1990 did not bear the true and genuine signature of the said Eu Chin Eow, deceased and was a forgery and that the said last will and testament and/or the grant of probate issued in respect thereof are in law invalid and null and void.

7. The 2nd and 3rd Defendants aver that if at all, the alleged last will and testament dated 26th November 1990 was executed by the deceased, which is denied, the deceased at the time that the said last will and testament was executed, did not know and approve of the contents of the said will.

PARTICULARS

The said deceased never gave any instructions for the said will and the said will was not read over or properly explained to him, nor did he read or was capable of reading the said will himself before it was executed nor was he aware of the nature and effect nor was he capable of comprehending or appreciating its provisions and effect.

8. Further and/or in the alternative to paragraph 7 herein, the 2nd and 3rd Defendants aver that if at all, the alleged last will and testament dated 26th November 1990 was executed by the deceased, which is denied, the deceased at the time that the said last will and testament was executed, was not of good health, sound mind, memory and understanding.

PARTICULARS

At the time of execution of the said will the deceased was 75 years old and was suffering from ill health, memory loss and senile dementia aggravated by his illness.

The deceased was at the time of execution of the said will in such a condition of mind and memory loss as to be unable to understand the nature of the act and its effect and the extent of the property of which he was disposing or to comprehend and appreciate the provisions and effects of the said will.

9. Further and/or in the alternative to paragraphs 7 and 8 herein, the 2nd and 3rd Defendants aver that, if at all, the alleged last will and testament dated 26th November 1990 was executed by the deceased, which is denied, the execution of the said will was obtained by the fraud of the Plaintiff.

PARTICULARS

i) The Plaintiff knows and knew at all material times that the deceased had given no instructions for the preparation of his last will and testament;

ii) The Plaintiff knows and knew at all material times that the deceased was close to his family in particular the 2nd Defendant and that the deceased had never been close to the Plaintiff or to any members of the Plaintiff's family or the Plaintiff's parents;

iii) The Plaintiff had upon the deterioration of the deceased's physical, mental and emotional health and without the knowledge and/or approval of the deceased given instructions to the solicitors to prepare the said will;

iv) The Plaintiff had upon the deterioration of the deceased's physical, mental and emotional health caused and/or induced the deceased to sign the said will when the deceased did not know, approve or comprehend or was capable of knowing, approving or comprehending the provisions and effects of the said will;

v) The Plaintiff had upon the deterioration of the deceased's physical, mental and emotional health caused and/or induced the deceased to sign the said will by falsely and fraudulently representing that the said will was some family document for the benefit of the deceased's wife and children.

10. Further and/or in the alternative to paragraphs 7, 8 and 9 herein, the 2nd and 3rd Defendants aver that, if at all, the alleged last will and testament dated 26th November 1990 was executed by the deceased, which is denied, the execution of the said will was not in accordance with the provisions of the Wills Act, 1959.

PARTICULARS

i) The deceased did not sign or acknowledge his signature to the said alleged will in the joint presence of the two (2) alleged witnesses;

ii) The alleged witnesses to the said alleged will did not attest and subscribe the said alleged will in the presence of the deceased;

iii) The 2nd and 3rd Defendants put the Plaintiff to strict proof that the provisions of the said Wills Act, 1959 were duly complied with.

11. Further and/or in the alternative to paragraphs 8, 9, and 10 herein, the 2nd and 3rd Defendants aver that if at all, the alleged last will and testament dated 26th November 1990 was executed by the deceased, which is denied, the said alleged will does not at all reflect the deceased's true will, intention and volition but was procured by the importunity of and/or determined by the Plaintiff in consultation with his solicitors without the knowledge and/or approval of the deceased.

12. Further or in the alternative, the 2nd and 3rd Defendants as the lawful unmarried daughter and widow respectively of the deceased claim that such reasonable provision as the Court thinks fit be made out of the deceased's net estate pursuant to Section 3 of the Inheritance (Family Provision) Act 1971 for the maintenance of the 2nd and 3rd Defendants respectively.

13. By reason of the matters aforesaid, the 2nd and 3rd Defendants have thereby suffered loss and damage.

Wherefore the 2nd and 3rd Defendants claim the following:

i) A declaration that the said alleged last will and testament of the late Eu Chin Eow, deceased dated 16th November 1990 is invalid and that deceased died intestate;

ii) An order that the grant of probate in respect of the purported last will and testament of deceased granted under Penang High Court Petition No. 32-66-1996 be set aside forthwith;

iii) An order that the Plaintiff do take such necessary steps to restore to the estate of the said Eu Chin Eow, deceased all assets, properties and effects belonging to the deceased and/or the documents of title in relation thereto;

iv) Damages for inducing or procuring the purported last will and testament dated 26th November 1990 and/or damages for fraud;

v) Further or in the alternative, such reasonable provision as the Court thinks fit, be made out of the deceased's net estate pursuant to Section 3 of the Inheritance (Family Provision) Act 1971 for the maintenance of the 2nd and 3rd Defendants as the lawful unmarried daughter and widow of the said Eu Chin Eow, deceased;

vi) costs; and

vii) such further and/or other reliefs that may be deemed just and appropriate.

[5] The plaintiff's reply to this is dated 23 August 1999 and reads:

JAWAPAN

1. Plaintif bergabung isu dengan defendan-defendan ke2 dan ke3 di atas mereka melainkan bahagian-bahagian yang terdiri daripada pengakuan.

PEMBELAAN KEPADA TUNTUTAN BALAS

2. Tuntutan balas defendan-defendan ke2 dan kes (selepas ini dirujuk sebagai "defendan-defendan") tidak mendedahkan sebarang kausa tindakan yang munasabah terhadap plaintif dan adalah remah, menyusahkan dan mengaibkan, akan memudaratkan, memalukan dan melewatkan perbicaraan tindakan ini secara adil, serta menipakan suatu penyalahgunaan proses Mahkamah.

3. Tuntutan balas defendan-defendan adalah berniat jahat, terdorong oleh malis dan ketamakan, direka-reka secara tidak jujur dan frodulen.

4. Melainkan bahawa defendan-defendan menipakan anak perempuan dan balu kepada simati, dakwaan-dakwaan lain di dalam perenggan 5 tuntutan balas adalah dinafikan sama sekali.

5. Plaintif menafikan dakwaan-dakwaan di dalam perenggan 6, 7, 8, 9, 10, 11 dan 13 tuntutan balas. Dakwaan-dakwaan tersebut adalah palsu belaka dan telah direka oleh defendan-defendan secara tidak jujur setelah defendan pertama tidak dapat membuktikan dakwaan-dakwaan palsunya mengenai pemalsuan tandatangan.

6. Plaintif mengambil dan mengulangi kandungan "Pembelaan Kepada Tuntutan Balas" di sini bertarikh 31/10/1996 sebagai sebahagian daripada pembelaannya di sini.

7. Semasa menandatangani wasiat tersebut, simati adalah berfikiran wajar dan memahami kandungannya yang telah dibaca, diterjemahkan dan diterangkan oleh salah seorang saksi, Encik Ian Lim Eu Keong (seorang peguamcara) kepadanya. Kesihatan dan keadaan mental simati pada ketika itu adalah baik dan beliau dapat memahami tindakan beliau sendiri. Beliau telah menandatangani wasiat tersebut secara sukarela. Semua peruntukan Akta Wasiat, 1959 telah dipatuhi.

8. Mengenai perenggan 12 tuntutan balas, defendan-defendan telah melayan simati secara tidak baik semasa beliau masih hidup dan adalah berkeupayaan menanggung diri. Defendan-defendan dikehendaki membuktikan bahawa mereka berhak dan belum kehilangan hak kepada sebarang peruntukan seperti yang dituntut.

9. Melainkan seperti yang diperakui secara nyata di atas, plaintif menafikan setiap dakwaan di dalam tuntutan balas defendan-defendan seolah-olah ianya telah dikemukakan di sini dan disangkal secara khususnya.

10. Dan Plaintif memohon agar tuntutan balas defendan-defendan ditolak dengan kos.

[6] After a full hearing, the learned judge allowed the plaintiff's claims in terms of prayer (a) and (c) as set out in the statement of claim and dismissed the defendants' counterclaims. In other words, the learned judge upheld the validity of the will. Against that decision the defendants appealed.

[7] Before us, learned counsel for the defendants/appellants submitted that the learned judge had erred in coming to the conclusion that there was no forgery. In this respect the learned judge in his judgment said:

The Defendants also called the Handwriting Expert, Mr. Siow Kwen Sia (SD3), as their witness to prove that the signature of the Deceased in the said Will was forged. SD3's reports can be found in exhibits D9 and D10. It was his opinion that the questioned signature of the Deceased in the said Will is of different authorship and that the questioned signature is a copied signature 'because of similarity in general form but differences in fine details'.

In *Lee Ing Chin & Ors v. Gan Yook Chin & Anor (supra)* the Court of Appeal has made the following observation on the expert opinion evidence, at page 57:

We consider it to be a well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document then it is a safe course for a court to prefer the direct evidence. Thus, in *Newton v. Ricketts* [1861] 11 ER 731, it was held as follows:

> Where the genuineness of handwriting to a deed is contested in Chancery, if an affidavit is produced from the sole arresting witness alive that he knew the persons executing the deed, and saw them execute it, and then wrote his own attestation, the fact that persons skilled in handwriting declare their belief, formed on inspection, that the handwriting is not genuine, does not call on that court to grant an issue to try the disputed fact; but it may determine that fact on the opposing affidavits.

In the instant case we have the direct evidence of the disinterested witnesses and as such their evidence should be accepted by this court. In addition there are several weaknesses in the procedure adopted by SD3 when examining the samples given to him. They are as follows:

(a) There was only one specimen in similar form i.e. specimen E1 being available as comparison to the signature on the said Will given to SD3 for examination.

(b) Moreover, E1 and the said Will were not signed at the same time. E1 was signed in 1995 but the Will was signed on 1990. SD3 himself told the Court that:

Q: A person's signature varies from time to time?

A: It varies slightly from time to time.

Q: For a time lapse of 10 years would it vary?

A: There would be subtle changes over a long period of time.

In this case, the possibility remains that the signature of the deceased had changed from 1990 to 1995.

(c) The subject signature and the sample signature were made by different writing apparatus as the evidence of SD3 confirms that:

(d) '(PI referred). The signature was made by a non ball point pen.'

'(The original of pg 75 shown). The signature was made by a ball point pen'.

(e) In the Article of *Harcharan Singh Tara* [1995] 3 MLJ 1 it was stated that

> The writing characteristic of those who have reached writing maturity, may be influenced by many factors like temporary or permanent physical disorders, eyesight, degree of self-control, aesthetic taste, mental disturbances, changes due to sanity.

None of these factors were taken into consideration by SD3 when forming his opinion even though SD3 himself had admitted that the above factors may affect the author's signature.

The failure on the Defendants' part to make a police report as soon as possible on the allegation of forgery did also raise doubts as to, whether their claim was *bona fide*. Despite having ample time and opportunity to seek legal advice and to take appropriate actions it was only on 3.11.2000, 5 years after the demise of the Deceased and after the Plaintiff has closed his case, that the police report was finally made.

Based on the foregoing reasons I find that there is no substance in the Defence's allegation that the signature of the Deceased on the said Will was forged and I accordingly hold that the said Will was duly executed by the Deceased.

[8] The defendants' counsel submitted that the learned judge failed to appreciate that with or without the evidence of the handwriting expert, the totality of the evidence, including the evidence of the deceased's children on the deceased's handwriting which remains unchallenged, do support the appellants' claim that the alleged will is indeed a forgery. The learned counsel went on to say that the trial judge's observations on the weaknesses in the procedure adopted by the handwriting expert and the defendants' failure to make a police report as soon as possible are irrelevant to the issue whether, in the totality of the evidence, the alleged will is indeed a forgery.

[9] The appellants contended that there had been misdirection on the part of the trial judge in placing upon the appellants the burden of proving testamentary incapacity contrary to settled law on the burden of proof. The appellants are only required to

question the mental capacity of the deceased, whether on pleadings or in evidence, but are not obliged in law, contrary to the trial judge's observation, to adduce any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time. The learned judge in his judgment said:

> It was the Defendants' contention that the Deceased at the time of the execution of the said Will was not of good health, sound mind, memory and understanding as can be gathered from the evidence of the three Defendants. All the Defendants said that in 1990 the Deceased's health was generally not good, he was in depression and he had developed the forgetful habit and started collecting rubbish, bottles and used cans and so on.
>
> The Plaintiff, on the other hand, through the evidence of SP2, SP3, SP4, SP5 and SP6 have shown that the Deceased gave the instruction for the said Will to be drawn up and the Deceased executed the said Will. SP6, Lim Cheng Chuan, the solicitor who prepared the said Will has testified that the Deceased gave the instruction to him to draw up the said Will. SP3, another solicitor has testified that the Deceased had the contents of the Will explained to him in Hokkien and the Deceased executed the said Will. Three other witnesses ie, SP2, SP4 and SP5 testified that they saw the Deceased executing the said Will.
>
> It is to be noted that the Defendants have not adduced any medical report to show that the Deceased lack testamentary capacity or was insane at the relevant time. On the other hand under cross-examination SD1 said that in November 1990 her father could walk around and could still go to the bank. SD2 has testified that from 1989 to 1991 the Deceased was still able to go to the bank and still able to note down his banking transactions. The Deceased went to see the doctor by himself in the 1990s. SD4 in her evidence stated that the Deceased had signed the form for the Public Bank Berhad for opening the fixed deposit account on 24.11.1990 which was 2 days before the date of the said Will.
>
> Having carefully considered the evidence before me it is my view that the Plaintiffs witnesses have given a credible evidence as to the circumstances leading to the preparation and the execution of the said Will. There was no reason for SP3 and SP6, the two solicitors involved in this case, to tell lies in court. I agree with the submission made by the learned counsel for the Plaintiff that the Deceased's ability to sign the bank's form in order to open an account with the bank 2 days before the execution of the said Will clearly demonstrates his capacity to understand the nature

A and consequences of his acts. Accordingly I hold that the Deceased did have the requisite testamentary capacity to make the said Will.

Testamentary Capacity

B **[10]** It is settled law that where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any C extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will, in this case the appellants. This is so stated by Gopal Sri Ram JCA in *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 where at pp 29-32 he said:

D

> The Burden Of Proof
>
> It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any E suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will – in this case the plaintiffs.
>
> In *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263, the former F Federal Court explained what is meant by 'testamentary capacity' and dealt with the question of onus of proof of that element as follows (at pp 264-265):
>
> > In the event, the learned judge pronounced in favour of the G will as he decided that the plaintiff had failed to discharge the onus of establishing testamentary incapacity on the part of the testator.
> >
> > In this appeal, the appellant was correct in his submission that the judge was wrong in placing such an onus on the H plaintiff. The plaintiff by his pleadings had clearly raised the issue as to testamentary capacity. A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind I must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property,

> and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Banks v. Goodfellow* [1870] LR 5 QB 565). Once this point was taken, it is clear law that the burden of proving testamentary capacity rested on the defendant. (See *Smee v. Smee* [1879] 5 PD 84 at p 91). There was therefore a misdirection on the part of the judge in putting the burden of proving testamentary incapacity in the first instance on the appellant.

In *Waring v. Waring* [1848] 13 ER 715 at p 720, Lord Brougham explained how the burden of proof in testamentary cases may shift from one party to the other. He said:

> The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied with his *prima facie* case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again.

In *Bankim Bihari v. Matangini Dasi* AIR [1919] PC 157, Sir John Edge explained what the propounder of a will must establish. He said:

> It was for the appellant to establish the mental capacity of the testator, that he understood the dispositions of the will, and that it was duly executed by him as his will (emphasis added.)

In *Barry v. Butlin* [1838] 12 ER 1089, the Privy Council, speaking through Parke B, laid down the two rules governing the nature of the onus of proof placed upon a party propounding a will:

> These rules are two: the first, that the *onus probandi* lies in every case upon the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator.

A

> The second is, that if a party writes or prepares a will under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased.

B

In the leading case of *Tyrell v. Painton* [1894] P 151 at p 157, Lindley LJ after referring to the two rules laid down in *Barry v Butlin* and to the cases of *Fulton v. Andrew* [1875] LR 7 HL 448 and *Brown v. Fisher* 63 LT 465 said:

C

> The rule in *Barry v. Butlin, Fulton v. Andrew,* and *Brown v. Fisher* is not, in my opinion, confined to the single case in which a will is prepared by or on the instructions of the person taking large benefits under it, but extends to all cases in which circumstances exist which excite the suspicion of the court; and wherever such circumstances exist, and whatever their nature may be, it is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will. (emphasis added.)

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As recently as 16 December 2002, the Judicial Committee of the Privy Council had occasion to consider the issue of the nature of the onus upon a propounder of a will to dispel suspicious circumstances. In *Lutchman Ramcoomarsingh v. The Administrator General* (Unreported, Privy Council Appeal No. 13 of 2001) an appeal from the Court of Appeal of Trinidad and Tobago, the board in its advice, delivered by Lord Slynn of Hadley said:

G

> In *Tyrell v. Painton* [1894] P 151 at p 157, Lindley LJ said that where circumstances exist which excite suspicion the onus is on the person propounding the will to prove that the testator 'knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will'.

H

I

> But as Lord Hatherley stressed in *Fulton v. Andrew* [1875] LR 7 HL 448, at p 469 there is no absolutely rigid rule that if a testator of competent mind has had his will read over to him that further injury is shut out but where that is done: 'very strong evidence is required in opposition to it in order to set aside any instrument so executed'. As Lord Cairns LC put it, at p 463, the duty is to bring home to the mind of the testator the effect of his testamentary act.

A little later, Lord Slynn continued as follows:

> These authorities, and many others to which it is not necessary to make reference since they are on similar lines, make it clear that where a person is in a fiduciary relationship with another who is intending to make a will, that person if he prepares or is closely involved in the preparation of the will or informing the testator's intentions must if the will is challenged satisfy the court that the testator knew and understood what he was doing and that the will has given effect to his intentions. The possibility of undue influence leading to the provision of such a benefit for the person, whether a solicitor or not, but particularly a solicitor, must be ruled out. The simplest way of avoiding the conclusion that there has been such influence is to ensure that an independent legal adviser is consulted by the testator or at any rate to give a clear and recorded opinion that such advice be obtained. But the statement in *Rhodes v. Bate* [1886] 1 Ch App 252, at p 257 upon which Permanand JA relies that the persons by whom the benefits have been conferred must be shown to have 'had competent and independent advice in conferring them' goes too far. It is simple and conclusive but other methods showing that the will contains the intention of the testator and that he knew and understood what he was doing may be sufficient to remove the suspicions which have arisen. (emphasis added.)
>
> To sum up, the effect of the authorities on the subject is that while the onus lies on the propounder of, a will to dispel any suspicious circumstances surrounding the making of the will, that burden may be discharged by showing that the testator, being of competent mind, had his will read over to him *(Fulton v. Andrew)* or that the testator knew and approved of the contents of the will *(Tyrrell v. Painton)*. One method of dispelling suspicious circumstances where there is a substantial gift to a person who either prepares or is closely involved in the preparation

A of a will is to show that the testator had obtained independent legal advice. Alternatively, the propounder may by other methods show that the will contains the intention of the testator and that he knew and understood what he was doing and in this way sufficiently remove any suspicions which may have arisen *(Lutchman Ramcoomarsingh v. Administrator General)*.

[11] The appellants had by their pleadings in their counterclaim raised the issue as to the testamentary capacity of the deceased alleging that the deceased at the time of the execution of the C alleged will was 75 years old and was suffering from ill health, memory loss and senile dementia aggravated by his illness' and was therefore 'not of good health, sound mind, memory and understanding'. The appellants gave evidence that the deceased was 'in late 1989 suffering from depression and very low blood D pressure', 'that his health was not good especially after his hospitalization in July 1989 where he was critically ill and almost died' and that after his hospitalization, 'he had developed the forgetful habit and started collecting rubbish, bottles, cans and old newspapers'. The trial judge in dismissing the appellants' claim had E in his grounds of judgment held that 'the defendants have not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time'.

[12] The law, as can be seen from the authorities I have cited F above, is that where unsoundness of mind is alleged, the burden of proof on testamentary capacity rests upon the party propounding the will which in the present appeal is the respondent. The passage in *Sarkar's Law of Evidence*, 14th edn, 1993, vol. 2 are in essence is the judgment of Lord Brougham in G *Waring v. Waring* [1848] 13 ER 715:

> Those who propound a will must show that the will of which probate is sought is the will of the testator, and that the testator was a person of testamentary capacity. In ordinary cases, if there is no suggestion to the contrary, any man who is shown to have H executed a will in ordinary form will be presumed to have testamentary capacity, but the moment the capacity is called in question, then at once the onus lies on those propounding the will to affirm positively the testamentary capacity.

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[13] In the present appeal, I do not think that there should be any doubt that it is sufficient for the appellants, as the party challenging the will, to call into question either by way of pleadings or evidence, the mental capacity of the deceased. The appellants had clearly by their pleadings and evidence raised the issue as to the testamentary capacity of the deceased. The moment the capacity is called into question, the onus lies on the respondent as the party propounding the purported will to affirm positively the testamentary capacity of the deceased. The appellants are in law not obliged to adduce any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time as it is incumbent upon the respondent, as 'the propounder of the alleged will to satisfy the court that the deceased had testamentary capacity at the material time'.

[14] The appellants submitted that the appellants do not assume any burden of proof on the deceased's testamentary incapacity until and unless the respondent had established that the deceased did indeed have testamentary capacity, ie, 'understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and with a view to the latter object no disorder of the mind must poison his affections, pervert his sense of right or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which if the mind had been made. …'

[15] In my view, the learned trial judge in accepting the evidence that the deceased had 'given instructions for the said will to be drawn up and that the deceased executed the said will' as demonstrating the deceased's testamentary capacity, had failed to appreciate that such evidence by itself does not discharge the burden of proof where there is suggestion to the contrary and where the factum is not regular or the will not in ordinary form. The suggestion to the contrary and the fact that the alleged will is not in ordinary form do point towards the burden of proving testamentary capacity remaining with the respondent. That the burden of proof had not shifted is clear from the following testimony of the respondent and his witnesses:

A (a) The respondent himself had admitted under cross-examination that he 'was not sure about the deceased's health', 'did not know for a fact that the deceased was suffering from depression' and 'did not know that after his hospitalization the deceased had the habit of collecting empty bottles and
B discarded clothes from the neighbourhood'.

(b) The lawyer, Lim Cheng Chuan (SP6), had under cross-examination admitted that 'he was not aware that the deceased had been hospitalized in 1989 and did not know
C that the deceased was receiving medication from the government clinic'.

(c) Lim Cheng Chuan also admitted during the cross-examination that 'there was material discrepancy in the description of the property' mentioned in the alleged will and that 'the
D instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong'.

(d) Another lawyer by the name of Lim Eu Keong (SP3) stated
E that he 'cannot remember whether the deceased knew the meaning of "undivided share" … cannot remember whether the deceased corrected me about the rubber estate' and had said that the deceased 'did not say anything' and had 'kept quiet' even when the address in the alleged will, not being his place
F of residence or his address as stated in the identity card, was explained to the deceased.

(e) The evidence of the respondent that it was his mother who took the deceased to see the lawyer when she alleged that the
G deceased wanted to make a will.

(f) The evidence of the respondent that it was his mother who informed him that the deceased had made a will whereby he is named the executor of the will.

H (g) The overall evidence shows that it was the respondent's mother who played an active part in persuading the deceased to draw the alleged will before the lawyer as chosen by the respondent's mother.

I

[16] In the face of the irregular features of the alleged will, which we have highlighted, and in particular the acknowledgment of SP6 that the instruction given by the deceased was wrong, it is incumbent upon the respondent to establish affirmatively that the deceased did have the testamentary capacity at the time of the purported instructions or the purported execution. In the absence of any evidence, medical or otherwise, I find that the trial judge is not justified to place the burden of proof on the appellants when he held that the appellants have not adduced any medical report to show that the deceased lacked testamentary capacity or was insane at the relevant time.

Knowledge And Approval

[17] In their counterclaim, the appellants raised the issue as to the knowledge and approval of the deceased of the contents of the alleged will as apparent from the allegation therein that 'if, at all, the alleged will was executed by the deceased, which is denied, the deceased at the time of the alleged execution did not know and approve of the contents of the said will'. In their submission, the appellants stated that the deceased could not speak Malay, English or Chinese. The evidence of the appellants given during the trial is that the deceased's Hokkien was not a local Hokkien but that of Eng Choon Hokkien was with a heavy accent. According to the appellants the deceased was not able to hold jobs for a long time due to the fact that he could not communicate easily because he could only speak in Hokkien which was heavily accented. In fact, he could not have given the particulars of the land to the lawyer as he was not familiar with the English and Malay languages.

[18] Tristram and Coote's *Probate Practice*, 28th edn 1995 at p. 658 states that in law, it is essential to the validity of a will that the testator should know and approve of its contents. Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate,* 18th edn, 2000, explains that a party who puts forward a document as being the true last will of the deceased must establish that the testator knew and approved of its contents at the time when he executed it. The testator's knowledge and approval of the contents of the will are part of the burden of proof assumed by everyone who propounds a testamentary document. *Tristram and Coote's Probate Practice*, 28th edn 1995 at p. 659 further, states that the burden of proof of the testator's

knowledge and approval lies on the party setting up the will and the burden is discharged *prima facie* by proof of capacity and due execution; but where this *prima facie* presumption is met by the cross-examination of the witnesses, the party propounding must prove affirmatively that the testator knew and approved of the contents.

[19] I agree with the submissions of the learned counsel for the appellants that since the appellants had clearly by their pleadings and evidence raised the issue as to the knowledge and approval of the deceased of the contents of the alleged will, it is incumbent upon the respondent, as the party propounding the alleged will, to prove affirmatively that the deceased knew and approved of the contents of the alleged will. The burden of proof on the respondent is heavier in the light of the acknowledgement by the respondent's own witness SP6 that there was a material discrepancy in the description of the property in the alleged will and that 'the instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong'. The learned counsel further submitted that although the issue of knowledge and approval on the part of the deceased of the contents of the alleged will had been expressly pleaded and raised as an issue, the issue had not, however, been specifically addressed by the trial judge. This is indeed acknowledged in the submission of counsel for the respondent that the trial judge had 'dealt with the issue of knowledge and approval as part and parcel of due execution of the will by the deceased'. Incidentally, the trial judge had held that the deceased knew and approved of the contents of the alleged will when he signed the said will in front of several witnesses.

[20] Williams, Mortimer and Sunnucks on *Executors, Administrators and Probate*, 18th edn, 2000 is clear that the law and case authorities are settled in that due execution cannot be equated with knowledge and approval as it is for the party propounding the will to prove affirmatively that the deceased knew and approved of the contents of the alleged will.

[21] Having considered the submissions of both parties, I have no difficulty in concluding that the respondent had failed to prove affirmatively that the deceased knew and approved of the contents of the alleged will on the following grounds:

(i) SP3 had under cross-examination admitted that he 'did not ask the testator to obtain his confirmation that he wanted the said will drawn up and executed' and that he 'did not find out from the deceased whether he understood English'.

(ii) SP3 cannot remember whether the deceased had said anything before or after the signing and cannot remember whether the deceased knew the meaning of 'undivided share' and cannot remember whether the deceased corrected him about the rubber estate.

(iii) SP3 had said that the deceased did not say anything and had kept quiet even when the address in the alleged will, not being his place of residence or his address as stated in the identity card, was explained.

(iv) SP6 acknowledged that there was a material discrepancy in the description of the property in the alleged will and that the instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong.

[22] The grave doubt that I have about the deceased's knowledge and approval of the contents of the alleged will is further highlighted by the fact that there is nothing in the attestation clause of the alleged will to indicate that the will was explained to the deceased, considering that the deceased was illiterate in English. SP3 admitted that there is nothing to show that he explained the contents of the will in Hokkien to the deceased. The absence of anything in the attestation clause to indicate that the will was explained to the deceased in Hokkien is serious enough to warrant my comment considering the strict requirements to be satisfied in respect of a will which contains no or insufficient attestation clause or a will which appears to be signed by a blind or illiterate testator before admitting the will to proof even in non-contentious probate proceedings under O. 71 rr. 9(1) and 10 of the Rules of the High Court 1980. Order 71 r. 9(1) provides:

> 9 Evidence as to due execution of will (O. 71 r. 9)
>
> (1) Where a will contains no attestation clause or the attestation clause is insufficient or where it appears to the Registrar that there is some doubt about the due execution of the will, he shall, before admitting it to proof, require an affidavit as to due

A execution from one or more of the attesting witnesses or, if no attesting witness is conveniently available, from any other person who was present at the time the will was executed.

Order 71 r. 10 provides:

B 10 Execution of will of blind or illiterate testator (O. 71 r. 10)

Before admitting to proof a will which appears to have been signed by a blind or illiterate testator or by another person by direction of the testator, or which for any other reason gives rise to doubt as to the testator having had knowledge of the contents
C of the will at the time of its execution, the Registrar must satisfy himself that the testator had such knowledge.

[23] The rationale behind the strict requirements to ensure that there is no doubt about the due execution of the will or as to
D the knowledge of the contents of the will at the time of its execution had been addressed time and again. In *Kenward v. Adams* (*The Times* 19 November 1975) *(Current Year Book 1975)*, Templeman J held that when a solicitor draws up a will for an aged or seriously ill testator, it should be witnessed or approved
E by a medical practitioner who ought to record his examination of the testator and his findings. In *re Simpson, deceased*, Vol. 121 Solicitor's Journal, No. 13 1 April 1977, where the condition of the testator was not known to the solicitor, Templeman J in pronouncing against the validity of the will in issue was constrained
F to repeat the warning he had given in *Kenward v. Adams* 'that the making of a will by an infirm testator ought to be witnessed and approved by a medical practitioner who satisfies himself as to the capacity and understanding of the testator and makes a record of his examination and findings' and that 'the Law Society would
G consider whether sufficient guidance was afforded to students and practitioners'.

[24] In *re Morris (deceased)* [1971] p. 62, it was held that 'when it was proved that a will had been read over to or by a capable
H testator and he then executed it, *prima facie*, the inference would be that the testator knew and approved the contents, but that the court was not precluded from considering all the evidence to arrive at the truth, and that that was so not only if fraud but also if mistake was suggested; and that, although the testatrix was
I competent, did in a literal physical sense read the codicil and did duly execute it, it was clear from the evidence that she did not in

fact know and approve its contents'. The court in that case cited with approval the headnote in *Fulton v. Andrew* [1875] LR 7 HL 448:

> There is no unyielding rule of law (especially where the ingredient of fraud enters into the case) that, when it has been proved that a testator, competent in mind, has had a will read over to him, and has thereupon executed it, all farther inquiry is shut out.

[25] In the present appeal, it is not disputed that the deceased signed the alleged will in a coffee shop below the solicitor's office. The reason given by the respondent was that the deceased was too old to climb the stairs leading to the solicitor's office, but then there is evidence to show that the deceased was able to walk even to the bank. There is no doubt in my mind that though a will could be attested anywhere, it is unusual for the signing of a will which needed explanation and translation to an old man, to be executed in a coffee shop amidst all the noise from the customers. Secondly, the solicitor who came down to attest the said will was not the solicitor to whom the deceased had allegedly given instructions to draw out the will. The solicitor who attested the will was not an official interpreter. Thirdly, it is indeed questionable why the will had to be attested in the coffee shop where the court was not far away from the coffee shop and an official interpreter was available at the court. Lastly, the respondent claimed that the deceased complained to the respondent and his mother that he was treated badly by his own family. No other evidence was adduced by the respondent to corroborate that piece of evidence. Obviously, the appellants denied that allegation. The evidence shows that the deceased returned to his family's house every night and the respondent did not deny this fact. There is no evidence from the mother of the respondent that the deceased spent most of his time in her house or had his meals and slept there. In my view, the evidence that the relationship of the deceased with his family was bad had been raised by the respondent in order to justify why the alleged will had favoured the respondent. As can be seen from the evidence it was the respondent's mother who played an active part in involving the deceased in preparing the alleged will such as supplying the respondent's identity card to the lawyer.

[26] In the circumstances, I am of the view that the learned trial judge could not possibly have satisfied himself that the deceased, if at all, he had executed the alleged will, knew and approved of the contents of the alleged will. If at all, there had been due

execution, the fact that the will had been explained to the deceased, or that the deceased signed the said will after the contents had been explained to the deceased or the fact that it is possible that the deceased could speak or understand Hokkien, does not, as a matter of law, furnish the affirmative proof that the deceased knew and approved of the contents of the alleged will.

Suspicious Circumstances

[27] The appellants had by their pleadings in the counterclaim raised the issue of suspicious circumstances in that 'the alleged will does not at all reflect the deceased's true will, intention and volition but was procured by the importunity of and/or determined by the respondent in consultation with his solicitors without the knowledge and/or approval of the deceased'. What is particularly disturbing about the suspicious circumstances is the undisputed fact that no file had been opened by the lawyer, SP6, although allegedly instructed by the deceased to prepare the will, that the notes containing the purported instructions had been destroyed and that the alleged will had the wrong particulars pertaining to the deceased's address and the deceased's property. In *Udham Singh v. Indar Kaur* [1971] 1 LNS 144, the Federal Court held that where suspicious circumstances had been raised, the onus should have been on the party propounding the will to explain them and that the trial judge had adopted 'a wrong approach to the question of onus' when 'assessing the suspicious circumstances only in the context of the plea of undue influence'. Further, in *Dr Shanmuganathan v. Periasamy Sithambaram Pillai* [1997] 2 CLJ 153, the Federal Court held that: 'At the close of the defendant's case there were numerous circumstances that clearly excited the suspicion of the court and these were still present and were not removed. The learned judge failed to consider any one of them and to ascertain if the burden under the law which required the defendant to prove his case had been discharged. Suspicious circumstances surrounding the emergence of the will were numerous. The circumstances were highly suspicious, abnormal and not normally expected in any ordinary situation or from a normal person. None of these suspicious circumstances was explained. The suspicions were not removed at all either after the witnesses gave their evidence or for that matter even after the close of the defendant's case'. In *Tyrell v. Painton* [1894] P 151, Lindley LJ said:

> It is for those who propound the will to remove such suspicion, and to prove affirmatively that the testator knew and approved of the contents of the document, and it is only where this is done that the onus is thrown on those who oppose the will to prove fraud or undue influence, or whatever else they rely on to displace the case made for proving the will.

[28] As the appellants had clearly by their pleadings and evidence 'raised the issue as to the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will', I find that there had been misdirection on the part of the trial judge in holding that it was unnecessary to deal with the suspicious circumstances as these 'have been considered and dealt with under the headings of testamentary capacity and due execution'. Apart from the misdirection on the part of the trial judge in failing to address the suspicious circumstances, it is clear that there had been no judicial appreciation of the evidence when the trial judge held that the suspicious circumstances 'were all circumstantial and some were mere conjectures and speculation'. Contrary to the trial judge's observation, I find that the suspicious circumstances surrounding or relevant to the preparation and execution of the alleged will are indeed factual and far too overwhelming to dispel having regard to the following:

(i) SP6's admission that the deceased did not personally make an appointment to see him on the alleged instructions and that it was the deceased's brother or his wife, Lim Too Eng (SP2) who made the appointment (it is to be noted these two people were the father and mother of the respondent).

(ii) No file was opened by the lawyer SP6 although allegedly instructed by the deceased to prepare the alleged will and by his own admission the notes bearing the deceased's instructions were destroyed.

(iii) The deceased's address in the alleged will being stated as 'No. 1-E, Mk 16, Ayer Itam, Penang' and not as '14, Mk 13, Ayer Itam, Penang' as in the deceased's identity card although the deceased's identity card was checked by lawyer SP6 at the time of the purported instructions and checked and compared by lawyer SP3 at the time of the alleged execution.

(iv) The deceased's property was described in the alleged will as 'my undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang' although by SP6's evidence, he 'did not ask the deceased for proof of ownership' and that the deceased 'had no other documents' except his identity card at the time of the alleged instructions.

(v) SP6's acknowledgment under cross-examination that 'there was a material discrepancy in the description of the property' mentioned in the alleged will and that 'the instruction given by the deceased, ie, that the land was a rubber estate and that he had a share in the rubber estate, was wrong'.

(vi) SP3's inability under cross-examination to recall whether the deceased knew the meaning of 'undivided share' and 'cannot remember whether the deceased corrected me about the rubber estate'.

(vii) The alleged will being purportedly signed by the deceased in a coffee shop although the deceased had purportedly climbed the stairs to the lawyer's office to give instructions a few days earlier.

(viii) The question put by the respondent's counsel to the deceased's widow, Ong Sin Kheng (SD2), the 3rd appellant, in cross-examination that the land title to the said property and the quit rent receipts were indeed kept by the deceased's brother, ie, the respondent's father.

[29] The appellants contended that what is no less disturbing and which would no doubt render the suspicious circumstances impossible to dispel is the seeming inability on the part of the respondent's witnesses, ie, Lim Cheng Chuan (SP6), Lim Eu Keong (SP3) and Ng Pooi Chee (SP5) to describe the appearance of the deceased, if at all, they had attended to him in some way. As against the description by the 3rd appellant, Ong Sin Kheng (SD2), the deceased's widow, of the deceased as being 'tall and fair in complexion', 'not similar in looks to the brother, who was short'. Lim Cheng Chuan described the deceased as darker in complexion but was not sure of his height. Lim Eu Keong was not able to describe the deceased's features or height. Ng Pooi Chee (SP5) described the deceased as dark in complexion and similar in height and size to the deceased's brother.

[30] The respondent's counsel had, in his submission, acknowledged that the property being described as a rubber estate and the use of 'undivided share' in the said will were only one of those suspicious circumstances. The appellants' counsel further contended that the respondent had not dispelled the suspicious circumstances. The suspicious circumstances were aggravated further when SP3 (the respondent's mother) attempted to present the respondent as the adopted son of the deceased by tendering a testimonial dated 27 December 1996, certifying that the respondent was 'given for adoption by Eu Chin Eow (the deceased) as his son', which was drawn up after the deceased's death on 10 December 1995 and signed only by the family members of the respondent. The respondent himself admitted that his relationship with the deceased and the deceased's family was far from close as he 'did not visit the deceased's family whenever I was in Penang', 'did not visit my uncle quite often or visit him at the hospital or attended his funeral' or 'paid respects after the funeral'. SP3 also attempted to present the said property in the alleged will as belonging to the respondent's father when she gave evidence that the property was purchased with funds belonging to her husband and that her husband was the owner.

[31] The appellants' evidence that the deceased was a good husband and a good father to the appellants and that the deceased could not communicate well with other people, was old-fashioned, conservative and extremely thrifty. The appellants gave evidence that the deceased had never mentioned anything about making a will or transferring the land stated in the alleged will.

[32] SP6 (the solicitor who drew up the will and to whom the deceased had allegedly given instruction to draw the will) gave evidence that no file had been opened and that the notes bearing the deceased's purported instructions had been destroyed. His eventual acknowledgement that 'the instruction given by the deceased was wrong' does give rise to the irresistible suspicion that the deceased may not after all have given his instruction on the alleged will. This evidence gives rise to suspicion that the will was not drawn on the instruction of the deceased but on the instruction of SP3 who was bent on getting the said property for her family.

[33] In this regard, the appellant's counsel had drawn my attention to the case of *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors* [1998] 1 LNS 340 where the credibility of the solicitor, Lim Cheng Chuan had been impugned in 'attestation of wills without the presence of a joint attesting witness' and 'his attestation of a will not correctly dated'. I find that the case cited by the appellant's counsel is relevant because the solicitor Lim Cheng Chuan in that case is SP6 in the present appeal. As can be seen from the evidence in the present appeal, SP6 had made the same errors as he did in the case cited to us. In *Khaw Cheng Bok & Ors v. Khaw Cheng Poon & Ors*, the learned trial judge who heard the case commented on the evidence of Lim Cheng Chuan as follows:

> Where he testified that all wills were executed on 3 August 1992, meaning that no wills were executed after 3 August 1992, he then testified that the deceased executed a second Thai will after 3 August 1992 without the joint presence of witnesses and that he attested that will after 3 August 1992. Where he denied all knowledge of a second Thai will, he then rendered a saturated account of the second Thai will. *Evidently, Lim (ie. Lim Cheng Chuan) could invert his testimony with ease but without any scruples whatsoever'.*
>
> However, the second Thai will was the irrefutable proof that the deceased executed more 'wills' than was pleaded by the first to third Defendants. *It was revealing proof that Lim (ie. Lim Cheng Chuan) was not averse to his attestation of wills without the presence of a joint attesting witness.* It was also revealing proof that Lim (ie. Lim Cheng Chuan) was not averse to his attestation of a will not correctly dated – the second Thai will executed after 3 August 1992 was dated 3 August 1992.
>
> Knowing that the deceased had signed the second Thai will without the joint presence of two attesting witnesses, he attested that the deceased signed the second Thai will in the presence of 2 witnesses. To say the least, that was highly irregular. Knowing that the second Thai will was executed after 3 August 1992, he dated it as 3 August 1992. That was deceitful. *Sadly, Lim, ie. Lim Cheng Chuan, a senior lawyer called for the purpose of proving due execution could not be believed on his assertion that the 1992 wills were intact.* Clearly, due execution was not proved.

[34] Perusing the evidence of SP6 as a whole, I could not help but come to the conclusion that the evidence of SP6 was highly suspicious if not untenable. I am of the view that the evidence of SP6 is crucial in the present appeal to remove the suspicious

circumstances in respect of the alleged will. In brief, the evidence of the respondent to remove any suspicious circumstances depends on the evidence of SP2, SP3, SP4, SP5 and SP6. SP6 gave evidence that he received instructions from the deceased to draw out the alleged will. From the evidence, it is clear to me that SP6 received instructions from SP2. SP2, the mother of the respondent, gave evidence that the property was not the property of the deceased but the property of her husband whose funds were used by the deceased to purchase the property, but nothing was adduced to substantiate this claim. From the evidence, I could not help but to conclude that it was SP2 who was more interested to have the property named in the will. It was SP2 who produced the identity card of the respondent to SP6. SP2 produced a testimonial that the respondent was the adopted son of the deceased but that testimonial was dated after the death of the deceased. Then there is evidence to show that the deceased executed the will in a coffee shop, if at all he did, rather than in the office of the solicitor (SP6). The evidence shows that the deceased did not sign the will in front of SP6 but in front of SP3. Bearing in mind that the deceased had difficulty in understanding Penang Hokkien, yet there was no official interpreter to interpret the will which is in English into Hokkien which was the dialect that the deceased understood. Further, how could SP3 explain the actual instructions given purportedly by the deceased since the instructions, if at all given, were given to SP6. As a result, there are discrepancies in the description of the said property.

Uncertainty

[35] It is the appellants' contention that there had been misdirection on the part of the trial judge in failing to appreciate that the alleged will is void on grounds of uncertainty or ambiguity as the deceased does not possess or own any rubber estate in Teluk Bahang nor does the deceased possess or own an undivided share in Lot 83 and Lot 488 Mukim 2 South West District, Penang. It is not in dispute that the deceased at the time of the alleged will was the registered proprietor of Lot 83 and Lot 488 Mukim 2 South West District, Penang. In the circumstances, and given the material discrepancy in the description of the property in that the deceased does not own an undivided share in the property mentioned, and in the absence of 'any evidence as to whether the deceased knew the meaning of undivided share, or his

intention in respect of the property he owns', I find the alleged will to be uncertain or ambiguous. Consequentially, no probate could therefore be ordered or enforced in respect of the alleged will.

Forgery

[36] The appellants had by their pleadings and in evidence raised the issue that the alleged will does not bear the true and genuine signature of the deceased and is a forgery and that the alleged will was procured by the importunity of and/or determined by the respondent without the knowledge and/or approval of the deceased.

[37] I have the opportunity of going through the judgment of the learned judge in respect of this issue. The only evidence by the appellants in respect of the forgery was the evidence of SD3 (the handwriting expert). I agree with the learned judge that the test carried out by SD3 was unsatisfactory because it was based only on one document and not several documents bearing the signatures of the deceased. In view of this, I am of the view that the learned judge was correct in holding that the appellants had failed to prove the signature of the deceased on the will was a forgery.

Conclusion

[38] Though I agree with the learned judge that the signature on the will was not a forgery, it does not mean that the respondent had succeeded in proving the will. The authorities show that where issues had been raised as to the testamentary capacity of the deceased testator or as to his knowledge and approval or suspicious circumstances, the onus is on the propounder, which is the respondent in this case. Having perused the record, it is clear to me that the respondent had failed to discharge this burden. The appellants had pleaded forgery of which I find that the appellants had not proved their case. In my view, the issue of forgery would come into play only after the respondent had discharged his burden of proof in respect of testamentary capacity. In the present appeal the respondent had failed to discharge the burden on him.

[39] For the reasons I have stated above, I will allow the appeal with costs here and below. The deposit is to be refunded.

Low Hop Bing JCA:

Appeal

[40] On 16 September 2005, the learned judge of the Penang High Court ("the trial court"):

(1) allowed with costs the claim of the plaintiff – respondent ("the plaintiff") and decreed the grant of probate ("the probate") for the will of one Eu Chin Eow, deceased, ("the deceased") dated 26 November 1990 ("the will"); and

(2) dismissed with costs the counterclaim of the first, second and third appellants – defendants ("the defendants") seeking *inter alia* to set aside the probate.

[41] This is the defendants' appeal against the aforesaid orders.

The Parties

[42] The plaintiff, the deceased's nephew, is the sole executor, trustee and beneficiary under the will.

[43] The first, second and third defendants are respectively the deceased's son, daughter and wife.

[44] The deceased died on 10 December 1995 at the age of 80.

Burden Of Proof

[45] Defendants' learned counsel Mr. JA Yeoh (Mr. JJ Chan with him) submitted that there was misdirection by the trial court in placing upon the defendants the burden of proving the deceased's testamentary incapacity when the defendants were only required to question the deceased's mental capacity. They relied on *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA.

[46] Learned counsel Mr. Ooi Soo Jit contended for the plaintiff that the trial court quite clearly has appreciated the law as it stood, referring also to *Lee Ing Chin, supra.*

[47] It is to be noted that the trial court followed the judgment of Gopal Sri Ram JCA delivered for the Court of Appeal in *Lee Ing Chin, supra*, at p. 29, which where relevant merits reproduction as follows:

A It is settled law where the validity of a will is challenged, the burden of proving testamentary capacity and due execution lies on the propounder of the will as does the burden of dispelling any suspicious circumstances that may surround the making of the will. However, the onus of establishing any extraneous vitiating element such as undue influence, fraud or forgery lies on those who challenge the will.

[48] In this context, the meaning of the expression "testamentary capacity" has been set out by the Federal Court in *Udham Singh v. Indar Kaur* [1971] 2 MLJ 263 at pp 264-265 in the following words:

A person has testamentary capacity when he understands the nature of his act and its effect; the extent of the property of which he is disposing; the claims to which he ought to give effect; and, with a view to the latter object, no disorder of the mind must poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties, and no insane delusion must influence his will in disposing of his property, and bring about a disposal of it which, if the mind had been sound, would not have been made. (*Banks v. Goodfellow* [1870] LR 5 QB 565)."(See also *Lee Ing Chin, supra* at p. 114 A-C).

[49] The burden of proof in testamentary cases may shift from one party to another, as evident in the succinct statement delivered by Lord Brougham in *Waring v. Waring* [1848] 13 ER 715 at p. 720 as follows:

The burden of the proof often shifts about in the process of the cause, accordingly as the successive steps of the inquiry, leading to inferences decisive, until rebutted, casts on one or the other party the necessity of protecting himself from the consequences of such inferences; nor can anything be less profitable as a guide to our ultimate judgment than the assertion which all parties are so ready to put forward in their behalf severally, that, in the question under consideration, the proof is on the opposite side. Thus, no doubt, he who propounds a latter will undertakes to satisfy the Court of Probate, that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the *factum* is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor, the party propounding, choose to rest satisfied with his *prima facie* case, after an issue tendered against him. In this event, the proof has shifted to the impugner; but his case may easily shift it back again. (See also *Lee Ing Chin, supra,* at p 114 D-F).

[50] The Federal Court in *Gan Yook Chin & Anor v. Lee Ing Chin & Ors* [2004] 4 CLJ 309 FC heard the appeal from *Lee Ing Chin, supra*. At p. 322 b-c Steve Shim CJ (S & S), delivering the judgment of the Federal Court held that the Court of Appeal had quite rightly stated the settled law. The Federal Court additionally adopted the instructive approach taken by the High Court of Australia (which is the apex court there) in *William Henry Bailey & Ors v. Charles Lindsay Bailey & Ors* [1924] 23 CLR 558, where Issacs J stated in para (8) that, once the proponent establishes a *prima facie* case of sound mind, memory and understanding with reference to the particular will, for capacity may be either absolute or relative, the *onus probandi* lies upon the party impeaching the will to show that it ought not to be admitted to proof.

[51] In the light of the above authorities, I am of the view that there was no misdirection by the trial court in holding that the defendants bear the burden of establishing the deceased's testamentary incapacity as an extraneous vitiating element. It needs also to be observed that such burden of proof may shift from the challenger or impugner to the propounder as explained in *Waring, supra.*

Testamentary Incapacity, Due Execution And Forgery

[52] The defendants alleged that the deceased's execution of the will was a result of testamentary incapacity, as the deceased was not of good health, sound mind, memory and understanding, being 75 years old and was suffering from senile dementia aggravated by his ill-health, and that the will has been forged.

[53] The plaintiff responded that the trial court had undertaken a tedious examination of the evidence and arrived at a correct finding that the will has been duly executed by the deceased.

[54] The plaintiff added that in the light of, *inter alia*, *Kameswara Rao v. Suryaprakasarao* AIR [1962] AP 178; and *Lee Ing Chin, supra*, the opinion of the handwriting expert SD3 must be treated with great caution.

[55] In the instant appeal, it is best to consider all the aforesaid issues together, as they are related but yet opposing to each other.

[56] The trial court had accepted the evidence adduced for the plaintiff through five witnesses *viz* SP2 to SP6. The cumulative effect of their evidence is that the deceased had given instructions for the will to be drawn up and that the deceased had duly executed the will.

[57] In particular, Mr. Lim Cheng Chuan (SP6), the solicitor who prepared the will, testified that the deceased had given instructions for him to prepare the will.

[58] Mr. Lim Eu Keng (SP3), another solicitor, testified that on 26 November 1990, he witnessed the execution of the will and that a few days before the execution thereof, three persons *viz* the deceased, his brother Eu Chin Sam and Eu Chin Sam's wife (ie the deceased's sister-in-law) went to the law firm of SP3 and SP6 to give instructions to SP6 to prepare, *inter alia*, the will. The content of the will was explained by SP3 in the Hokkien dialect to the deceased in the presence of SP4 who is SP3's clerk. The deceased then executed the will.

[59] SP5 who was a friend of the deceased testified that he saw the execution of the will by the deceased in the presence of two attesting witnesses *viz* SP3 and SP4. SP5 also confirmed that SP2, the plaintiff's mother, was present at the same time.

[60] The defendants were not present when the will was executed by the deceased. However, they testified that the deceased's signature on the will could not have been affixed by the deceased.

[61] The trial court had evaluated the entire evidence adduced for the defendants to the effect that in 1990 at the time of the execution of the will, the deceased was neither in good health, nor of sound mind, memory and understanding being in depression, and had developed forgetful habits as he had started collecting rubbish, bottles, used cans and so on. The defendants however did not tender any medical evidence to support the deceased's testamentary incapacity, mental delusion, senile dementia or insanity at the time of the execution of the will. On the contrary, the deceased's daughter (SD1) under cross-examination confirmed that in November 1990, the deceased could walk around and could still go to the bank.

[62] SD2, another witness for the defendants, confirmed that from 1989 to 1991, the deceased was still able to go to the bank and record his banking transactions, and that the deceased went by himself to see his doctor in the 1990s.

[63] SD4's evidence was that on 24 November 1990 which was two days before the execution of the will on 26 November 1990, the deceased had signed Public Bank forms for the purpose of opening a fixed deposit account.

[64] Upon a careful consideration of the entire evidence adduced for both the plaintiff and the defendants, the trial court accepted as credible the evidence adduced for the plaintiff relating to the preparation and due execution of the will, there being no reason for the two solicitors *viz* SP3 and SP6 to tell lies in court.

[65] Next, the trial court considered the evidence of the handwriting expert SD3 who gave evidence for the defendants. SD3 testified that the deceased's signature in the will was forged, being of different authorship "because of similarity in general form but difference in fine details".

[66] The trial court found that the procedure adopted by SD3, in examining the samples given to him, revealed the following weaknesses:

(1) only one specimen signature ("the specimen signature") E1 was available for comparison with the signature on the will given to SD3 for examination;

(2) the specimen signature and the signature on the will were not signed at the same time; the former in 1995, while the will was signed in 1990, and SD3 confirmed that a person's signature varies slightly from time to time and that there would be subtle changes over a period of time;

(3) the specimen signature was affixed by means of a ballpoint pen while the signature on the will was not written by means of a ballpoint pen; and

(4) SD3 admitted that the author's signature may be affected by many factors such as "temporary or permanent physical disorders, eyesight, degree of self-control, aesthetic taste, mental disturbances, changes due to sanity" as advocated in the article *"Examination of Handwriting and Signatures"* by

A Harcharan Singh Tara [1995] 3 MLJ i; but SD3 had not taken any of these factors into consideration when forming his opinion.

[67] The trial court also found that the defendants had failed to B make a police report in connection with the alleged forgery of the will and so was not convinced of the credibility of the evidence adduced for the defendants.

[68] The immediate question that arises for determination herein is whether there is any appealable error on the part of the trial C court to warrant appellate interference.

[69] In my judgment, it is to be noted that the question of whether the will has been forged is one of fact. The learned trial judge had the audio visual advantage of evaluating the evidence of D the plaintiff's witnesses, in particular SP3, SP4, SP5 and SP6, who are disinterested witnesses testifying for the plaintiff. All these four witnesses have given direct evidence that it was the deceased who had executed the will. It is immensely important to specifically analyse the respective role of these witnesses.

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[70] SP6 was the solicitor to whom the deceased had given instructions to prepare the will. He had testified that due execution of the will by the deceased was witnessed by two persons *viz* SP3, also a solicitor and the solicitor's clerk, SP4. The F deceased's due execution of the will was at the same time effected in the presence of SP5 who was a friend of the deceased and was with the deceased. There was no evidence that any of these four witnesses were actuated by any ulterior motive or collateral purpose to induce them to concoct half-truths or G untruths in relation to the respective roles played by them as adumbrated above.

[71] By way of comparison and contrast, the trial court found that the evidence adduced for the defendants were at best bordering on conjectures and speculations.

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[72] I am of the view that the trial court's specific finding of facts based on the acceptance of the evidence adduced for the plaintiff as credible, in preference to the evidence adduced for the defendant, is free from any error.

I

[73] The trial court is correct in holding that the plaintiff, as the propounder of the will, has discharged the burden of proving due execution of the will.

[74] I shall now consider whether the defendants as the challengers or impugners of the will have succeeded in discharging the onus of establishing forgery as a vitiating element.

[75] In this regard, SD3's evidence as a handwriting expert must be viewed in the light of the evidence of the plaintiff's disinterested witnesses who had actually seen the signing of the will by the deceased and that the trial court has found these witnesses to be credible witnesses.

[76] A case in point is *Lee Ing Chin, supra*, where the Court of Appeal after referring to *Newton v. Ricketts* [1861] 11 ER 731; and *Kameswara Rao v. Suryaprakasarao* AIR [1962] AP 178 enunciated the principle at p. 57 as follows:

> We consider it to be well established general guide to the judicial appreciation of handwriting evidence that where there is a sharp conflict between the direct testimony of a disinterested witness on the one side and that of a handwriting expert on the other as to the genuineness of the execution of a document, then it is a safe course for a court to prefer the direct evidence.

[77] On appeal, the Federal Court in *Gan Yook Chin, supra*, affirmed the above sentiment expressed by the Court of Appeal.

[78] The trial court had therefore correctly declined to accept SD3's evidence, and rightly held that the defendants had failed to discharge the burden of proving forgery.

Principles Of Appellate Intervention

[79] The trial court had meticulously embarked upon a sufficient appreciation of the evidence adduced at the trial, by assessing, weighing and for good reasons, accepting the evidence of due execution adduced for the plaintiff as credible and meanwhile finding that the defendants have not discharged the burden of proving the testamentary incapacity of the deceased and forgery of the will.

[80] For this purpose, in *Lee Ing Chin, supra,* at p. 33, the Court of Appeal re-affirmed that:

A … an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

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A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria. He must also test the evidence of a particular witness against the probabilities of the case.

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[81] On appeal, in *Gan Yook Chin, supra*, it was argued that the Court of Appeal had applied a new technique of 'insufficient judicial appreciation of the evidence" which was quite different from the established "plainly wrong" test which merely required the court to look at the substance of the judgment as a whole and not a minute examination of the evidence of all the witnesses. The Federal Court at p. 320 f-g held that the Court of Appeal "had clearly borne in mind the central feature of appellate intervention ie to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phase "insufficient judicial appreciation of evidence" merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on issues of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test."

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[82] On the issues of testamentary incapacity, due execution and forgery, I apply the aforesaid principle and hold that there is no appealable error on the part of the trial court to warrant any appellate interference.

I

Knowledge And Approval

[83] The defendants complained that the trial court had failed to appreciate that the plaintiff has to prove affirmatively that the deceased knew and approved of the contents of the will, particularly:

(1) when the deceased could not understand the will which was written in the English language;

(2) the deceased's address in the will differed from that in his identity card;

(3) the deceased's property was described as "undivided share in the rubber estate in Teluk Bahang, Penang known as Lot 83 and Lot 488 Mukim 2 South West District, Penang", when the property was not a rubber estate and the deceased owned the whole property; and

(4) the deceased's daughter SD4 testified that the deceased could not have given the particulars of the property to the lawyers as the deceased did not have the title deed.

[84] The plaintiff stressed that the trial court had considered the evidence of the witnesses and correctly arrived at the conclusion that the deceased knew and approved of the contents of the will.

[85] The essence of the trial court's finding is that the solicitor SP6 had prepared the will accordingly as instructed by the deceased who came to his office a few days before 26 November 1990. The attesting solicitor SP3 had explained the contents thereof in the Hokkien dialect to the deceased. The deceased replied that he agreed with the contents and then signed the will. SP4 also confirmed this. The trial court found as illogical the suggestion that after residing in largely Hokkien-speaking Penang for almost 50 years, the deceased could not speak and understand Penang Hokkien. Further, the deceased's son, SD1, communicated with the deceased in simple Hokkien.

[86] In my judgment, the description of the property as 'rubber estate" and "undivided share" and the different addresses alluded to above are minor discrepancies which do not give rise to any doubt in relation to the identity of the property, as the material particulars such as the lot numbers, the mukim and the district

have been accurately and specifically stated in the will. There is no uncertainty or ambiguity in the contents of the will. Hence, the validity of the will is in no way negated.

[87] The trial court's finding is based on the credibility of witnesses after embarking upon a proper judicial appreciation of the evidence adduced at the trial. I am unable to find any misdirection in this respect and so I must refrain from any appellate interference.

Suspicious Circumstances

[88] The defendants outlined the following circumstances to vitiate the will:

(1) SP6 who was instructed to prepare the will did not open any file and the deceased did not make any appointment with him;

(2) Witnesses SP3 and SP6 could not describe the appearance of the deceased;

(3) The will was purportedly signed by the deceased in a coffee shop;

(4) The will was not in the possession of the deceased's family members but was instead in the possession of the plaintiff's mother;

(5) The plaintiff was merely a nephew of the deceased and had attempted to present himself as the deceased's adopted son;

(6) The deceased was poor, reserved and thrifty; and

(7) The deceased was a devoted husband and father to the defendants' respectively.

[89] The plaintiff relied on *Lee Ing Chin, supra,* and contended that the plaintiff's burden of dispelling suspicious circumstances has been discharged by showing that the deceased knew and approved of the contents of the will.

[90] The trial court had dismissed the defendant's contentions as mere conjectures and speculations.

[91] In this regard, I am of the view that the answer to the defendant's submission is to be found in the following passages.

(1) "A court of probate must first be satisfied that a testator understood the dispositions of a will, and that it was duly executed by him as his will. Once so satisfied, it is not concerned with the fairness of the will. A court must resist the natural temptation to set aside a will on the ground that it does not appear to be fair, equitable or just." (*Lee Ing Chin, supra,* at p. 60);

(2) "It is not for us to fathom the motivations of a man. His actions and reactions are unpredictable as they depend upon so many circumstances. There is, however, always some dominant and impelling circumstances which motivate a man's action though in some cases even a trivial and trifling cause impels him to act in a particular way which a majority of others may not do. At times psychological factors and the frame of mind in which he is, may determine his action." (per Jaganmohan Reddy J in *Surendra Pal v. Saraswati Arora* AIR [1974] SC 1999); and

(3) "A man may act foolishly and even heartlessly; if he acts with full comprehension of what he is doing the court will not interfere with the exercise of his volition." (*Motibai Hormusjee v. Jamesetjee* AIR [1924] PC 28 at p. 33 PC)

[92] As alluded to above, the plaintiff as propounder of the will bears the burden of dispelling any suspicious circumstance that may surround the making of the will.

[93] This burden may be discharged by showing that the deceased being of competent mind, had his will read over to him (*Fulton v. Andrew* [1875] LR 7 HL 448) or that the deceased knew and approved of the contents of the will (*Tyrrell v. Painton* [1894] P 151). (see *Lee Ing Chin, supra*).

[94] Since the trial court had accepted the evidence of SP2 to SP6 and arrived at a specific finding of fact that the will has been read over to the deceased and the deceased understood the dispositions of the will, after which he had executed the will as his will, there is an end to any and all of the so-called suspicious circumstances and indeed all other collateral issues raised against the validity of the will (see *Lee Ing Chin, supra,* CA, at p. 58).

A

Conclusion

[95] On the foregoing grounds, I hold that the defendants' appeal is devoid of merits and is dismissed with costs. The orders of the trial court are hereby affirmed. Deposit to the plaintiff on account
B of taxed costs.

Raus Sharif JCA:

[96] I have had the advantage of reading the judgments of my learned brothers Mokhtar Sidin, JCA and Low Hop Bing, JCA in
C draft. I am in agreement with the conclusion of my learned brother Low Hop Bing, JCA that this appeal be dismissed with costs.

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